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ALEXANDER L. STEVAS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No. 80-1872

GARY ALLEN,

Petitioner,

vs.

JAMES B. ELLISOR, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE SOUTH CAROLINA ELECTION COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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I.

QUESTION PRESENTED

Should the opinion and judgment of the Fourth Circuit Court of Appeals holding constitutional a state statute disenfranchising persons convicted of certain crimes be vacated and remanded as moot.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at ___F.2d___, and is set out in the Appendix of the Petition at 1a.

The opinion of the United States District Court for the District of South Carolina granting petitioner's motion for summary judgment is reported at 477 F.Supp. 321 and is set out in the Appendix of the Petition at 50a.

The order dated September 29, 1975, of the district court certifying plaintiff class and the order dated October 16, 1975 of the district court ordering notice to that class are unreported.

JURISDICTION

The Respondent does not question the Court's jurisdiction in this proceeding.

STATUTORY PROVISIONS INVOLVED

Section 7-5-120(5)(b), South Carolina Code of Laws, 1976 (recodified from §23-62(5)(b), Code of Laws of South Carolina, 1962):

> Persons convicted of burglary, arson, obtaining goods or money under false pretenses, perjury, forgery, robbery, bribery, adultery, bigamy, wife-beating, housebreaking, receiving stolen goods, breach of trust with fraudulent intent, fornication, sodomy, incest, assult with intent to ravish, larceny, murder, rape or crimes against the election laws shall be disqualified from being registered or voting, unless such disqualification shall have been removed by pardon.

The above statute was amended by Act R 655 of the General Assembly of South Carolina:

> Section 2. The last paragraph (b) of Section 7-5-120 of the 1976 Code is amended to read:
>
> "(b) Persons convicted of a felony carrying a penalty of five years or more shall be disqualified from being regis-

tered or voting, unless such disqualification shall have been removed by service of the sentence, including probation and parole time unless sooner pardoned."

STATEMENT OF THE CASE

This suit was instituted in South Carolina Federal District Court in 1975 to challenge the state disenfranchising statute. Following a motion for summary judgment by both sides, the district court granted summary judgment for the Petitioner finding that the list of crimes in the State statute was unconstitutional.

The decision of the district court was appealed by the Respondent to the Fourth Circuit Court of Appeals. The Court of Appeals sitting en banc reversed the federal district court and remanded an issue not previously decided by the federal district court to the District Court. This issue concerns the question of racial discriminatory in-

tent and is not involved in this petition.

During the time the case was on appeal, the General Assembly enacted legislation amending this statute. The new statute, which substantially amended the prior one, was submitted to the United States Department of Justice for its approval under the Voting Rights Act; and it was precleared on March 20, 1981.

ARGUMENT

On January 14, 1981, the Governor signed into law a bill that effectively amended the South Carolina disenfranchisement statute. This followed a decision by the Fourth Circuit sitting en banc upholding the prior statute. In objecting to ceriorari being granted for purposes of vacating the decision of the Fourth Circuit, it is Respondent's posi-

tion that the case should not be deemed mooted as a final determination of the merits of this case because the decision below furthers the public interest involved in this case. Southern Pacific Terminal Co. vs. Industrial Commerce Commission, 219 U.S. 498, 55 L.Ed. 310, 31 S.Ct. 279 (1911). The basic question involved in this action, whether or not a state has the authority under Section 2 of the Fourteenth Amendment to choose various disqualifying crimes for purposes of disenfranchisement, is one that can arise again in future litigation. It is possible, although certainly at this time unplanned and unexpected, that the state may at some time decide to expand the statutory list of crimes to include provisions already litigated in the prior statute. It would appear to be an unnecessary exercise to force the state to possibly re-

litigate the entire question again because the original Fourth Circuit decision on the merits of the constitutionality of this question was vacated.

Further, as this suit was certified a class action, it is probable that members of the class who were covered by both the original and the new statute would still have standing to litigate the questions presented by this case on the powers of a state to choose disenfranchising crimes. Sosna v. Iowa, 419 U.S. 393, 42 L.Ed.2d 532, 95 S.Ct. 553 (1975).

CONCLUSION

For the foregoing reasons, the judgment below should not be vacated nor remanded to the district court with directions to dismiss as moot.

Respectfully submitted,

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